No. 11236

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Bower-Dillard Wholesale Co., a copartnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

Sears-Roebuck & Co., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellant,

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Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The Appellant filed suit in the Superior Court of the State of California in and for the County of Los Angeles, on a common count for the value of goods, wares and merchandise delivered to Appellee, and on the second count on the open-book account, and on the third count for accounts stated all in the sum of $7,738.99, together with interest thereon from January 14, 1944 [Tr. 2, 3, 4] and thereafter the Defendant and Appellee was served with copy of Summons and Complaint in said action. Defendant and Appellee thereupon made a motion to remove said cause to the United States District Court for the Southern District of California, Central Division, said Petition for Removal being made upon the grounds that there is diversity of citizenship between

the parties in that the Plaintiff and Appellant is a co-partnership and the principals thereof are citizens of the State of California, while the Defendant and Appellee is a corporation created and existing under the laws of the State of New York, and at the time of the petition, was still a resident and citizen of the State of New York, and was a non-resident of the State of California, and further that the amount in controversy involved exceeded $3,000.000. [Tr. 5, 6, 7.] The Superior Court thereupon granted said petition and the matter was removed to the said District Court. [Tr. 12, 13.]

On June 9, 1944, Defendant and Appellee filed its Answer and Counter-Claim, said Counter-Claim having several causes of Counter-Claim based upon breaches of different warranties, and claiming $10,358.02 to be due Defendant and Appellee. [Tr. 15-23.] That thereafter Plaintiff and Appellant filed its reply to said Counter-Claim, setting forth denials as well as the affirmative defenses of negligent handling by Defendant and Appellee, laches on the part of Defendant and Appellee, and waiver and estoppel. [Tr. 24-29.]

The matter was thereafter tried before the Honorable Leon R. Yankwich, Judge of said District Court, and on April 2, 1945, judgment was thereupon rendered in said Court. [Tr. 44, 45.] Within the time prescribed by law, Plaintiff and Appellant filed its Motion for New Trial [Tr. 45, 46, 47], and on September 10, 1945, said Motion for New Trial was denied, [Tr. 48], and thereafter, within the time prescribed, the

Plaintiff and Appellant served and filed its Notice of Appeal [Tr. 48, 49], and on January 12, 1946, the parties, through their attorneys, entered into a Stipulation concerning the record on appeal and the case was thereupon certified to the Circuit Court of Appeals. [Tr. 50, 51.]

U. S. Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of Section 128-A of the Judicial Code as amended February 13, 1925. (28 U. S. C. A. Sec. 225.)

Statement of the Case.

The within proceeding was instituted by the Appellant to recover monies past due for goods, wares and merchandise sold and delivered at the Defendant's special instance and request and upon an open-book account, the third count, to-wit, on the account stated having been abandoned by Stipulation in open court. [Tr. 52.] The ledger sheets and invoices which were introduced as Plaintiff's Exhibits 1 and 2 [Tr. 53] show that the goods, wares and merchandise were of a general character handled by Appellant and Appellee in their normal course of business and at the time of trial the Defendant and Appellee stipulated in open court that said amounts were properly due and that no evidence would be necessary to support said claims and that the sum of $7,738.99, together with interest at the rate of 7% per annum from January 14, 1944, was due, owing and unpaid to the Appellant. [Tr. 52, 53.]

The Appellee then proceeded on its Counter-Claim and the facts involved in said Counter-Claim are hereinafter set forth:

In October of 1943, the parties had a conference concerning the sale of fudge by Appellant to Appellee, at which time a sample was shown to the buyer of Appellee. After considerable conversation, Appellee placed an order for 28,000 pounds of said fudge at 55¢ per pound, [Tr. 56, 57], and during the conversation Appellant advised Appellee that the Appellant had no knowledge of that type of fudge and that the Appellee in turn had "lots of experience" [Tr. 110] and the Appellee thereupon also testified that it did not rely on any custom or usage in the business. [Tr. 111.]

The Appellee also desired a change from the sample, requesting that the fudge, when shipped, contain more nuts and also be a lighter color. [Tr. 109, 110; 61.] In that conversation the Appellant had very little to say in that most of the conversation was carried on between the Appellee's representative, Mr. Ashby, and the factory representatives, Mr. Erhardt and Mr. Mitchell. [Tr. 55, 56.] In the presence of the said Mr. Ashby, the Appellant thereupon gave the factory representatives his check in the sum of $7,000.00 in partial payment of the order placed by Mr. Bower of Appellant to the manufacturer. [Tr. 298.] Thereafter and after the formula had been changed to include the additional nuts and change of color, a further sample was air-mailed from the factory and shown to Mr. Ashby, which oc-

curred on November 1, 1943. [Tr. 295, 296.] Shipments were then made and various quantities were received by Appellee, beginning November 15, 1943 and when they had received the total amount of their purchase order on or about December 4, 1943 [Tr. 253, 254], Appellee diverted the shipments to their various stores and said fudge was thereafter offered and sold to the public. [Tr. 255.]

On November 29, 1943, Mr. Ashby, the representative of Appellee, visited the Appellant and complained of the manner in which the fudge was coming in and specifically complained that the fudge was too moist and soft to be salable and usable and at that time the said Mr. Ashby advised the Appellant that he was stopping payment on Appellant's account and that the fudge would not be paid for, and in the presence of Mr. Ashby, Mr. Bower, partner of the Appellant, dictated a stop-payment order to their bank, stopping the payment of checks which he had theretofore forwarded to the manufacturer. [Tr. 297, 298.] The factory representatives then called upon Mr. Ashby and showed Mr. Ashby how to handle the fudge and thereby dispose of same. [Tr. 300; 169.] Thereafter, and on December 2, 1944, Mr. Ashby phoned Mr. Bower and advised him that he could use the fudge and that Appellant would receive a check within a few days and that the Appellant should release the stop-payments that he had theretofore placed against the checks which he had forwarded to the manufacturer, [Tr. 300], and in reliance upon Mr. Ashby's statements, the Appellant paid for the fudge.

That from December 2, 1943, to January 12, 1944, the Appellant received no notice that the fudge was not saleable but did receive various and sundry complaints that the extra Christmas girls did not like to handle the fudge and that it was not selling too well, and that Mr. Ashby had over-bought. [Tr. 303; 288.] These facts are admitted by Mr. Ashby. [Tr. 133, 134.] There were several conversations after January between the parties and finally on January 12, 1944, the Appellee stopped payment on Appellant's account [Tr. 367] which then showed a balance due in the amount prayed for in the Complaint and which was stipulated by the parties as having been due on that date, to-wit, $7,738.99.

Appellee claims that some of the fudge was not saleable, to-wit, 9,620 pounds [Tr. 42], and Appellee's Counter-Claim was found to have due for said breach of warranty $6,637.80. [Tr. 42.]

Specifications of Error.

The Court erred in the following particulars:

(1) That upon the Stipulation of the parties and upon the findings, the judgment for the Plaintiff should have carried interest on the full amount, to-wit, $7,738.99, at the rate of 7% per annum, from January 14, 1944, and that the amount awarded the Appellee on the Counter-Claim, to-wit, $6,637.80, should bear interest only from the date of Judgment, to-wit, April 2, 1945.

(2) That the evidence is insufficient to support the findings in conclusion that notice of any alleged defect

was given to the Appellant with sufficient timeliness and clarity.

(3) That the evidence is insufficient in failing to disclose any cause for the alleged defectiveness and unsalability of the fudge, which burden is upon the Appellee claiming defectiveness and unsalability.

(4) That the evidence is insufficient to support the damages allowed in the Counter-Claim in that the Appellee failed to allege and prove all of the elements of said alleged damage, to-wit, the elements of profit.

(5) That the evidence of adjustments of fudge other than that delivered to the Appellee was improperly admitted.

(6) That the District Court should have found that the Appellee was estopped by his actions and conduct from claiming any breach or damage therefrom.

(7) That there is insufficient evidence to show any express warranty.

(8) That there is insufficient evidence to support the findings that the Plaintiff and Appellant made any express requests to Defendant and Appellee for the Appellee to receive further shipments after the discovery of the alleged defectiveness.

(9) That the Court erred in making immaterial and irrelevant findings with regard to any adjustments made between the Appellant and the manufacturer, involving fudge other than that fudge delivered to the Appellee.

ARGUMENT.

I.

Interest on a Claim for Damage in an Unliquidated Amount Cannot Accrue Until After the Amount Is Ascertained by Judgment.

Under the Stipulation and evidence introduced by the Plaintiff and Appellant at the beginning of the trial [Tr. 52, 53] Plaintiff is clearly entitled to interest as prayed for in the Complaint, to-wit, 7% on $7,738.99, from January 14, 1944, and if the balance of the judgment is affirmed on appeal, Defendant is only entitled to interest from the date of judgment which is the first ascertainment of the amount of damages to which Defendant and Appellee would be entitled to under its Counter-Claim.

The law is clear that where the action is to recover unliquidated damages, no interest can be allowed until the amount is determined. This was the holding in the case of *Krasilnikoff v. Dundon,* 8 Cal. App. 406, 97 Pac. 172 at 174, in which case the action was one for damages resulting from a breach of warranty of quality, and the lower Court awarded interest from the date of sale. The District Court of Appeal reversed this ruling and a rehearing by the Supreme Court was denied, the Appellate Court holding that in such a case, interest runs only from the date of entry of the judgment.

For a similar holding, see *Armstrong v. Lassen Lumber and Box Company,* 260 Pac. 810 at 813. (Note: The District Court in the last above cited case modified

the judgment by striking interest which was awarded in the lower Court. A hearing was granted in the Supreme Court in the same case at which time the Supreme Court reversed the entire case and did not pass upon the propriety of the interest allowance or disaffirmance. See 269 Pac. 453.)

II.

Buyer Failed to Give Notice of Alleged Breach of Warranty Within a Reasonable Time.

In order to determine the above statement, it is necessary to first ascertain when the buyer did give notice. However, even this question is dependent upon a determination of what constitutes legal notice.

The general rule is found in many authorities and is as follows:

> "It must be such as fairly to apprise that the Buyer intends to look to him for damages for the breach."
>
> 55 *Corp. Jur.* 807, 808, par. 788;
>
> *Truslow & Fulle v. Diamond Bottling Co.,* 112 Conn. 181, 151 Atl. 492;
>
> *Bell v. Maine,* 49 Fed. Sup. 689

See also other definitions of what the notice must be in the following quotations and cases cited therefor:

> "The notice must be such as to repeal an inference of waiver and to be reasonably inferable therefrom that the Buyer is asserting a violation of his rights."
>
> *Nashua River v. Lindsay,* 242 Mass. 206, 136 N. E. 358.

"It is the obvious purpose of the statute that to fix liability on the Seller, the Buyer must give timely information of the Buyer's *intention to seek from the seller damages for the breach of warranty.*" (Italics ours.)

Silvera v. Broadway Department Store, 35 Fed. Sup. 625 at 626.

"The notice of the breach required is not of the facts . . .but of Buyer's claim that they constitute a breach. The purpose of the notice is to advise the Seller that he meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning."

American Mfg. Co. v. U. S. Shipbuilding Board, 7 F. (2d) 565.

"It has been held that a mere complaint is not sufficient; the notice must advise the Seller that the Buyer is looking to him for damages."

Wildman Mfg. Co. v. Davenport Hosiery Mills, 147 Tenn. 561, 249 S. W. 984;

1 *U. L. A.* (Sales) 292.

The annotator for the Uniform Sales Act, in discussing the *Truslow & Fulle v. Diamond Bottling Co., supra,* interpreted the case as follows:

"The fact that the purchaser constantly complains to the Seller that the purchased product is defective and causes him to suffer great losses in his business is insufficient to constitute notice where the Buyer continues to accept the product for more than a year after the development of the trouble and relies upon the Seller's assurance of improvement of design and adjustment of losses."

Truslow & Fulle v. Diamond Bottling Co., supra, further goes on to cite that the purpose of the requirement of notice is to give the seller an opportunity of governing himself accordingly by taking such steps as may be necessary to protect himself.

In *Bell v. Maine, supra,* the Court placed upon the buyer the duty of exercising due diligence in inspecting the goods and advising the seller of the defects. The Court further conditioned the buyer's right of rejection upon a prompt and unequivocable complaint, further stating "mere complaint as to quality, while exercising dominion over the goods, does not constitute rejections."

To the same effect see *Cosmo Dress v. Perlstein,* 4 Atl. (2d) (Pa.) 596, where the Court held that the buyer's right to reject must be made promptly and unequivocably.

In applying the law applicable in the case before us, it is unequivocable that the first complaint, to-wit, that of Ashby's conversation on or about November 29, 1943, [Tr. 297-298] was withdrawn on or before December 3, 1944, [Tr. 300] and that the first notice, which complies with the requirements of the above cases, was that of Ashby's letter of January 20, 1944. [Tr. 100, Ex. H.] This is fully two (2) months after Ashby knew, or should have known, of the alleged defects. The evidence clearly indicates that Appellant did not consider the mere complaints a notice. The evidence of Bower's knowledge was merely that the buyer was having sales difficulties and that it was not wholly pleased with its purchase. The payment of the invoices by the buyer [Tr. 340, 341] negatives any prior complaint as constituting notice. None of the testimony introduced by the buyer could be called unequivocable so as to put the seller on

notice that a claim for damages was to be placed against him for the alleged defects.

From the above, it must be concluded from all the evidence that Bower never received notice sufficient to comply with the requirements of the statutes and cases prior to January 20, 1944.

We must now determine whether or not a notice given at that late date is given within "a reasonable time after buyer knows or ought to know, of such breach."

To resolve this question, we must look to and take in consideration the type of the commodity which was the subject matter of the sale and keep this fact in mind at all times. The evidence clearly indicates that candy is very perishable and particularly fudge. [Tr. 274, 275.] The perishability of fudge, as disclosed by the evidence, increases with the quantity of butter and cream used to make such fudge. [Tr. 275, 368, 369.] The Court can take judicial notice of the fact that butter and cream will spoil rapidly if kept at room temperatures, and also to preserve said product, it is necessary to keep them under refrigerated conditions. The witness, Mr. Mitchell, also testified that in his opinion as an expert, a 67° temperature was not sufficiently cool for the purpose of preserving this type of fudge. [Tr. 272.] The only refrigeration involved in the handling of the fudge was the fact that it was shipped in refrigerated cars from Chicago to the buyer's warehouse. In the instant case it is clear that the buyer waited until the perishable commodity had perished prior to giving any notice.

At this time, I also want to call the Court's attention to what other Courts have held to be a reasonable time for the giving of notice.

With respect to a sale involving shoes, it has been held that a delay from August 9th to September 17th, to-wit, thirty-eight (38) days, before giving notice of rejection, was an unreasonable delay as a matter of law.

Silberman v. Engel, 211 N. Y. S. 584.

Two (2) months was held to be unreasonable with regard to dress goods.

Elk Textile Co. v. Cohn, 75 Pa. Sup. Ct. 478.

In *Kaufmann v. Levy,* 169 N. Y. S. 454, a delay of 23 days was held to be unreasonable.

In *Bomze v. Schwartz Textile,* 100 Pa. Sup. Ct. 588, notice given 26 days after buyer should have known the breach with regard to cloth purchased was held to be an unreasonable delay.

See also *Foel Packing Co. v. Harris* (1937), 193 Atl. (Pa.) 152, where a delay from early June to August 24th was held to be unreasonable and this case went on to set forth that the buyer's exercise of ownership by selling the merchandise prevents his claim for breach of warranty even though the buyer, while using the product, complained as to the quality.

In considering the cases hereinabove set forth, the time limit exercised by the buyer in the instant case clearly was unreasonable in that those cases did not involve perishable commodities. Surely the time must be shortened where we have an item such as fudge, which the testimony clearly indicates is extremely perishable. In view of the above holdings, it is respectfully submitted that the notice given by the buyer in the instant case was not timely for the preservation of his claim for damages.

III.

It Is Incumbent Upon the Buyer (Appellee) Who Asserts a Breach of Warranty, to Prove the Cause Thereof and That the Cause Proved Results From the Seller's or Manufacturer's Actions.

The above rule of law has been set forth on several occasions in California. The leading case on the subject is that of *Consolidated Pipe Co. v. Gunn,* 140 Cal. App. 412, 35 P. (2d) 350 at 352. In the said case, the buyer failed to prove any defect in the merchandise sold, but he did prove that under normal working conditions and under normal use, the product of the seller did not perform the task which it normally would perform. The District Court of Appeal, in affirming the trial court's denial of relief to the buyer, pointed out that the exact cause of the failure of the article sold was not disclosed by the evidence, and further, that upon the buyer showing the failure of the article under normal working conditions, did not shift the burden of proving the cause. The District Court of Appeal stated that to hold otherwise would amount to making the seller an insurer of its product.

To the same effect, Appellant cites *Cerruti Mercantile Co. v. Semi Land Co.,* 171 Cal. 254, 152 Pac. 727, wherein the seller testified that the brandy, which was the subject matter of the sale conformed to the warranties at the time it was shipped. The buyer's testimony disclosed that after considerable lapse of time, the brandy did not conform to the warranties. The Supreme Court there held that the burden was on the buyer to show the cause of the condition which breached the warranty, and that the seller's case was further supported by the presump-

tions contained in the Code of Civil Procedure 1963, subdivision 32, that is, that a thing or condition proved to be good is presumed to continue in the same condition. Of course, this presumption is rebuttable, but the appellee in the instant case has not overcome the presumption.

Applying the above cases to the facts before us, the evidence discloses that there might be many causes for the condition of the fudge sold to the appellee, such as heat, humidity and other forces of nature. [Tr. 160, 161, 275.] There was considerable evidence introduced by the Appellee that the fudge was maintained in a cool temperature, which was sometimes defined as varying from 67° to comfortable room temperature. The only evidence in the entire transcript concerning whether or not such temperatures were adequate for preserving fudge was that of Mr. Mitchell, who testified that 67° temperature was not sufficiently cool for the purpose of preserving this type of fudge. [Tr. 272.] Mr. Mitchell also testified that when the fudge was shipped from Chicago, the shipments were in a condition of quality that was superior to the sample originally shown the Appellee and equal to the sample which was subsequently shown to Appellee. [Tr. 269 and 270.] Victor Pocius, the manufacturer of the fudge, who was called as a witness on behalf of the Appellee, also testified that all the fudge shipped from Chicago was of the same condition and standard as the sample previously shipped and was made in the same manner. [Tr. 159.]

In view of this testimony, the seller (Appellant) complied with the requirements of the hereinabove cited cases by showing that the fudge was in good quality when shipped, and the Appellee completely failed to disclose any

cause for the alleged defectiveness with the one exception, to-wit: that they did not keep the fudge at a sufficiently cool temperature to preserve same for the period of time they held it.

IV.

In Order to Recover More Than the Actual Cost of Defective Merchandise, the Buyer Must Show the Elements That Compose Its Profits.

The three leading cases in support of the above statement of law are *Coates v. Lakeview Oil Co.,* 20 Cal. App. (2d) 113, 66 Pac. (2d) 463; *Roach Bros. v. Lactein,* 57 Cal. App. 379, 207 Pac. 419; *Boyles v. Kingsbaker Bros.,* 5 Cal. (2d) 68, 53 P. (2d) 141.

In *Roach Bros. v. Lactein, supra,* there was involved a breach of warranty in a sale of food commodity. The Court held that the burden was on the purchaser to show that it could not obtain a similar commodity or reasonable substitute therefor in the open market at the same price, before it would be entitled to any loss of profits as an element of its damage. This rule was also approved in both of the other above cited, more recent, cases. In both of the other cases, to-wit: *Coates v. Lakeview Oil Co., supra,* and *Boyles v. Kingsbaker Bros. Co., supra,* the Court went on to say that in any event, the loss of profits would be the net profit and not the gross differential profit.

In the instant case, there was no attempt made by the Appellee to show any of the elements of the cost of marketing, by which the Court might determine the actual net profit to be derived by the Appellee if the alleged defectiveness had not appeared in the fudge. In view of

the above cited cases, the lower Court erred in awarding any damages in the counter-claim over and above the fifty-five cents (55¢) per pound, which was the cost to Appellee of the fudge.

V.

Evidence Concerning Condition and Quality of Fudge Other Than That Delivered to Appellee Was Erroneously Admitted.

Appellant can find no cases directly in point or even close enough to be analogous to the facts involved in the instant case. However, Appellant feels that from the primary basic rules of evidence, that the testimony of Mr. Pocius, the manufacturer, concerning adjustments made between the manufacturer and the Appellant with relation to the fudge which Appellant had bought and not sold to the Appellee, was clearly outside of the issues and did not tend to prove or disprove the condition of the fudge which was sold to the Appellee.

Counsel for Appellee contended that the testimony would show that an adjustment had been made between the manufacturer and the Appellee, which included the fudge sold to Sears. [Tr. 142.] However, Mr. Pocius testified that the adjustment was made only on the invoice which he had stopped payment on subsequent to the shipments which were received by the Appellee. [Tr. 147, 156, 157 and 158.] However, the Court, in its memorandum opinion, laid great stress upon the adjustment as influencing its decision, and felt that the adjustment testified to by Mr. Pocius should have been passed on to the Appellee. The evidence clearly indicates that the adjustment was not made pursuant to the contention

made by the counsel for the buyer, as hereinabove set forth, but rather was made for other reasons, to-wit: That the shipments were coming in too late, that is, after the Christmas season, and that Appellant, as a jobber, was not in a position to dry out the moist fudge, and that the manufacturer had shipped part of the merchandise after receiving cancellation, and upon other grounds. The adjustment was made concerning only merchandise which the Appellant had in its own stockroom and which was in transit. [Tr. 283 and 284.]

VI.

The Buyer, Appellee, by Its Actions, Conduct and Statements, Was Estopped From Asserting Any Breach of Warranty, Having Waived Same.

The following facts clearly show that the Appellee, by its conduct and expressions, caused the Appellant to believe that the Appellee had no complaints concerning the fudge and would use all of same, and thereby prejudiced Appellant's position with the manufacturer:

(1) On or about November 29, 1943, Ashby advised Appellant that Appellee would not pay for the fudge. [Tr. 116, 117, 297, 298, 299.]

(2) Appellant thereafter stopped payment on his checks to the manufacturer, and this was done in the presence of Ashby, Appellee's representative. [Tr. 119, 298, 299.]

(3) On or about December 2, 1943, Ashby advised Appellant that the fudge invoices would be paid by buyer as they became due. [Tr. 301, 302, 121.]

(4) In Ashby's presence, Appellant withdrew the stop-payment order on checks to the manufacturer. [Tr. 301.]

(5) Appellant thereupon wrote a letter to the manufacturer, to-wit, Exhibit 7, which discloses a complete reliance by the seller upon buyer's new acceptance. [Tr. 301.]

(6) The above facts clearly disclose that buyer repurchased the fudge in its then known condition.

(7) Between December 2nd and 25th, 1943, buyer had a conversation with Mitchell concerning other products and, during this conversation, never mentioned that the fudge was defective, although he well knew that Mitchell was the manufacturer's representative with regard to the fudge. [Tr. 270.]

(8) Between December 2, 1942 and January 4, 1944, although Ashby saw Appellant on many occasions, his only complaint was that the fudge was "messy," "hard to handle," "was having trouble with green and inexperienced help" [Tr. 173, 306], and other mild complaints.

(9) After November 29, 1943, buyer continued to accept shipments of fudge, which is indicated by the shipping records disclosing the last shipment to arrive on or about December 6, 1943. [Tr. 254.]

(10) Buyer paid for all of the fudge invoices with one exception, which exception was because of a discrepancy in the amount shipped. [*Note*: See Ex-

hibits 14 and 15, which are the copies of vouchers attached to the invoices paid.] [Tr. 342.]

(11) Without contacting the seller, the buyer attempted to sell all of the fudge to Clark. [Tr. 104, 105, 106, 288.] (*Note*: The date of this attempted sale is in conflict since Ashby claims the attempt was made prior to his letter of January 20, 1944, but Clark discloses that that attempt was made "considerably later than January 24, 1944." Clark's testimony is corroborated by the fact that he had already bought fudge from Appellant on January 24, 1944, and that this conversation was later than that.) [Tr. 288.]

(12) Buyer attempted to have the fudge recooked by the Triangle Candy Company and this was also without notifying the seller. [Tr. 105, 106.]

VII.

The Trial Court Erred in Finding That There Was an Express Warranty.

There is absolutely no evidence of any express warranty to be found anywhere in the transcript in the testimony of any person. In fact, testimony of all the parties is directly to the contrary. Mr. Ashby admitted that the Appellant told him he had no experience or knowledge concerning bulk fudge, and further admitted that there were no expressions of warranty during any of the conversations. [Tr. 110, 111 and 267.] Therefore, there could be no express warranty.

VIII.

The Trial Court Erred in Finding That the Appellant Expressly Requested Appellee to Continue to Accept Shipments.

The above set forth finding is contained in Finding No. V. [Tr. 41.] Counsel for the Appellant has carefully read and reread the entire transcript, and has been unable to find a scintilla of evidence which would support such a finding. This finding is material and is erroneous. Said finding has a tendency to counteract the hereinabove set forth points which constitute waiver and estoppel.

IX.

The Trial Court Erred in Finding That the Adjustment Made With the Manufacturer Was Made on a Basis Which Included the Fudge Received by Appellee.

In Finding No. VI [Tr. 41], the trial court found that the adjustment made between the Appellant and the manufacturer included consideration for the defectiveness of the merchandise sold to Appellee. This finding is not supported by the evidence. Mr. Pocius, the manufacturer, testified that the adjustment was made on invoices in transit as well as the merchandise which was in the warehouse of the Appellant. [Tr. 156, 157 and 158.] Mr. Mitchell testified to the same effect. [Tr. 282, 283, 284 and 285.] Mr. Bower of Appellant testified to the same effect. [Tr. 327.] This evidence completely refutes the finding which was made by the court and that finding was stressed by Judge Yankwich in his memorandum decision. [Tr. 30, 31.]

Conclusion.

It is respectfully submitted that the judgment entered by the trial court is in error and should be modified to the extent of allowing the appellant judgment as prayed for in its complaint and as stipulated by the defendant, Appellee, to-wit: Seven thousand seven hundred thirty-eight and 99/100 dollars ($7,738.99), with interest at the rate of seven per cent (7%) per annum from January 14, 1944.

Dated, at Los Angeles, California, the 7th day of May, 1946.

JEROME D. ROLSTON,
Attorney for Appellant.